IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Opinion on Remand

STATE OF TENNESSEE v. BRYANT GUARTOS, a.k.a. BRYANT GUARTOS CHARRY, a.k.a. BRIAN GUARTOS, a.k.a. BRIAN CRUZ, a.k.a. HECTOR CRUZ DELEON

Appeal from the Criminal Court for Davidson County
No. 2001-A-280 Cheryl Blackburn, Judge

No. M2003-03073-CCA-R3-CD - Filed December 4, 2007

This case is before the court upon the United States Supreme Court's remand for further consideration of the sentences imposed in light of Cunningham v. California, 549 U.S. ___, 127 S. Ct. 856 (2007). Guartos v. Tennessee, ___ U.S. ___, 127 S. Ct. 1250 (2007). We hold that the trial court applied enhancement factors which were not found by a jury beyond a reasonable doubt, in violation of the defendant's Sixth Amendment right to a jury trial. However, we are unable to conduct a de novo review of the defendant's sentences because the trial court did not make specific findings relative to the state's proof of the defendant's prior criminal convictions. We reverse the defendant's judgments for especially aggravated robbery, aggravated robbery, and conspiracy to commit aggravated robbery and remand for resentencing.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Reversed; Case Remanded.

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which DAVID H. WELLES and J.C. MCLIN, JJ., joined.

David L. Raybin, Nashville, Tennessee (on appeal), and Michael Colavecchio, Nashville, Tennessee (at trial), for the appellant, Bryant Guartos, a.k.a. Bryant Guartos Charry, a.k.a. Brian Guartos, a.k.a. Brian Cruz, a.k.a. Hector Cruz DeLeon.

Robert E. Cooper, Jr., Attorney General and Reporter; Mark A. Fulks, Assistant Attorney General; Victor S. (Torry) Johnson, III, District Attorney General; and Bret Thomas Gunn, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The issue before the court relates to the sentencing procedure employed by the trial court pursuant to the Sentencing Reform Act of 1989 as it existed before its 2005 amendments. The defendant was sentenced under the Act to an effective sentence of life plus forty-seven years. His individual sentences were life for first degree felony murder, twenty-five years for especially aggravated robbery, twelve years for aggravated robbery, and ten years for conspiracy to commit aggravated robbery. The trial court applied several enhancement factors in the sentencing process, including the defendant's history of criminal convictions or behavior, that the defendant was a leader in the commission of the offense, that the personal injuries inflicted or the amount of property taken was particularly great, and that the defendant had a previous history of unwillingness to comply with the conditions of a sentence involving community release. See T.C.A. § 40-35-114(1), (2), (6), (8) (1997). On appeal to this court, the defendant claimed sentencing error because the trial court made judicial findings of fact relative to enhancement factors other than the defendant's prior criminal history and that those findings were constitutionally required to be made by a jury, in accord with Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004). This court held that the defendant waived this issue by failing to raise it at the sentencing hearing, in accord with our state supreme court's pronouncement in State v. Gomez, 163 S.W.3d 632 (Tenn. 2005) ("Gomez I"). The United States Supreme Court then granted certiorari, vacated, and remanded both the Tennessee Supreme Court's Gomez I opinion and the opinion of this court in the defendant's case relying upon Gomez I with instructions that both cases be reconsidered in light of Cunningham v. California, 549 U.S. ___, 127 S. Ct. 856 (2007). See State v. Bryant Guartos, No. M2003-03073-CCA-R3-CD, Davidson County (Tenn. Crim. App., Jan. 24, 2006), app. denied (Tenn. Aug. 28, 2006), cert. granted, vacated, and remanded sub nom Guartos v. Tennessee, ___ U.S. ___, 127 S. Ct. 1250 (2007).

In Gomez I, our supreme court upheld the pre-2005 version of the Sentencing Reform Act of 1989 in the face of a Sixth Amendment right-to-jury-trial challenge. Gomez, 163 S.W.3d at 654-58. In Cunningham, the United States Supreme Court rejected a California sentencing statute which allowed sentence enhancement based upon judicially determined facts other than the existence of prior criminal convictions. See Cunningham, 549 U.S. ____, 127 S. Ct. 856. Upon reconsideration of the Gomez case, our supreme court held that in light of the dictates of Cunningham, the Tennessee sentencing statute violated the Sixth Amendment. Gomez, ___ S.W.3d ___ (Tenn. 2007) ("Gomez II").

However, the Gomez II court did not resolve the looming question of whether a defendant waives his Sixth Amendment sentencing claim by failing to raise the issue in the trial court. The court held that it was unnecessary to determine whether Gomez and his co-defendant were entitled to plenary appellate review because the record established that they were entitled to plain error relief. Gomez II, ___ S.W.3d at ___.

In the present case, the defendant was sentenced on May 16, 2001, after the United States Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000), but before Blakely. Because Blakely relied on Apprendi, a determination of whether Blakely announced a new rule of law is necessary to determine if the defendant in the present case is entitled to plenary appellate review or if he is relegated to relief only if plain error occurred.

In this regard, we are guided by State v. Chester Wayne Walters, No. M2003-03019-CCA-R3-CD, White County (Tenn. Crim. App. Nov. 30, 2004), app. denied (Tenn. Mar. 21, 2005), an opinion of this court which predates Gomez I. In Chester Wayne Walters, this court said

> . . . The United States Supreme Court has stated that "[w]hen a decision of this Court results in a 'new rule,' that rule applies to all criminal cases still pending on direct review." Schriro v. Summerlin, [542] U.S. [348], [351], 124 S. Ct. 2519, 2522 (2004). The state argues that Blakely does not establish a new rule but merely clarifies the rule announced in Apprendi. In support of its argument, the state notes that the Supreme Court stated in Blakely that "[t]his case requires us to apply the rule we expressed in Apprendi." Blakely, 542 U.S. at [301], 124 S. Ct. at 2536.
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> A case "'announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal government.'" Van Tran v. State, 66 S.W.3d 790, 810-11 (Tenn. 2001) (quoting Teague v. Lane, 489 U.S. 288, 301, 109 S. Ct. 1060, 1070 (1989)). "To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." Teague, 489 U.S. at 301, 109 S. Ct. at 1070.
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> In Apprendi, the defendant was convicted of many offenses, including second degree possession of a firearm for an unlawful purpose, for shooting into an African-American family's home. Although state law prescribed a sentence of five to ten years for a second degree offense, a New Jersey hate crime statute provided that a judge could enhance the defendant's sentence above the maximum in the range if the crime was racially motivated. Pursuant to the statute, the trial court sentenced the defendant to twelve years in confinement. The Supreme Court reversed, holding that, other than the fact of a prior conviction, the Constitution requires the jury to find beyond a reasonable doubt any fact that increases the penalty for a crime beyond the "prescribed statutory maximum." 530 U.S. at 490, 120 S. Ct. at 2362-63.
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> The state contends that Blakely merely extends the rule announced in Apprendi. However, in Graham v. State, 90 S.W.3d 687, 692 (Tenn. 2002), our supreme court held that the noncapital sentencing procedure in this state complied with Apprendi, saying,
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> > In Apprendi, the United States Supreme Court reviewed a New Jersey provision that allowed a judge to impose a sentence exceeding the statutory maximum for an offense if the judge finds, by a

> preponderance of the evidence, that the offense constituted a hate crime. The [Tennessee] Supreme Court struck the provision down, holding that due process requires that "any fact, other than a previous conviction, used to enhance a sentence above the statutory maximum must be: (1) charged in the indictment, (2) submitted to the jury, and (3) proven beyond a reasonable doubt." State v. Dellinger, 79 S.W.3d 458, 466 (Tenn. 2002) (quoting Apprendi, 530 U.S. at 476, 120 S. Ct. 2348). However, the Court emphasized that the judge still retains his discretion to consider all enhancing and mitigating factors "[within the range] prescribed by the statute." Apprendi, 530 U.S. at 481, 120 S. Ct. 2348 (emphasis added).
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> The petitioner in this case received a sentence within the statutory maximum for each crime. Accordingly, the trial court was well within its constitutional and statutory authority to consider enhancing factors for the purpose of sentencing without the assistance of the jury. Thus, Apprendi provides the petitioner with no relief.

We acknowledge that Blakely extended Apprendi's holding that, under the Sixth Amendment, a jury must find all facts used to increase a defendant's sentence beyond the statutory maximum. However, nothing in Apprendi suggested that the phrase "statutory maximum" equated to anything other than the maximum in the range. To the contrary, the United States Supreme Court stated the issue in Apprendi as "whether the 12-year sentence imposed . . . was permissible, given that it was above the 10-year maximum for the offense charged in that count." 530 U.S. at 474, 120 S. Ct. at 2354. We also note that the Supreme Court has considered the retroactive effect of the holding in Ring v. Arizona, 536 U.S. 584, 592-93, 122 S. Ct. 2428, 2435 n.1 (2002), as a new rule for capital cases even though it was based on Apprendi. See Schriro, [542] U.S. at [357-58], 124 S. Ct. at 2526-27. Perhaps this resulted from the fact that Ring overruled a case that had held the opposite. See Walton v. Arizona, 497 U.S. 639, 110 S. Ct. 3047 (1990). In this regard, with our own supreme court expressly approving our sentencing procedure under Apprendi, we have a difficult time faulting a defendant in Tennessee for not raising the issue before Blakely. We conclude that Blakely alters Tennessee courts' interpretation of the phrase "statutory maximum" and establishes a new rule in this state. The

> defendant's raising the issue while his direct appeal was still pending is proper.

Chester Wayne Walters, slip op. at 19-21.

We acknowledge that this court's Chester Wayne Walters opinion is not in accord with the supreme court's ruling in Gomez I. However, we believe the subsequent developments in the Gomez litigation breathe new life into Chester Wayne Walters. As such, we hold that the defendant in the present case, like the defendant in Chester Wayne Walters, promptly raised his Sixth Amendment issue and is entitled to plenary appellate review.

Appellate review of sentencing is de novo on the record with a presumption that the trial court's determinations are correct. T.C.A. § 40-35-401(d) (2003).[1] As the Sentencing Commission Comments to this section note, the burden is now on the defendant to show that the sentence is improper. This means that if the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, we may not disturb the sentence even if a different result were preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

However, "the presumption of correctness which accompanies the trial court's action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In this respect, for the purpose of meaningful appellate review,

> [T]he trial court must place on the record its reasons for arriving at the final sentencing decision, identify the mitigating and enhancement factors found, state the specific facts supporting each enhancement factor found, and articulate how the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. T.C.A. § 40-35-210(f) (1990).

State v. Jones, 883 S.W.2d 597, 599 (Tenn. 1994).

Unless enhancement factors are present, the presumptive sentence to be imposed is the minimum in the range for a Class B, C, D, or E felony. T.C.A. § 40-35-210(c) (2003). The sentence to be imposed by the trial court for a Class A felony is presumptively the midpoint in the range when there are no enhancement or mitigating factors present. Id. Our sentencing act provides that, procedurally, the trial court is to increase the sentence within the range based on the existence of enhancement factors and, then, reduce the sentence as appropriate for any mitigating factors. Id. at

[1] We note that on June 7, 2005, the General Assembly amended Tennessee Code Annotated sections 40-35-102(6), -114, -210, -401. See 2005 Tenn. Pub. Acts ch. 353, §§ 1, 5, 6, 8. However, the amended code sections are inapplicable to the defendant's appeal.

(d), (e). The weight to be afforded an existing factor is left to the trial court's discretion so long as it complies with the purposes and principles of the 1989 Sentencing Act and its findings are adequately supported by the record. Id. § 40-35-210 (2003), Sent'g Comm'n Cmts.; State v. Moss, 727 S.W.2d 229, 237 (Tenn. 1986); see Ashby, 823 S.W.2d at 169.

In addition to his life sentence for his felony murder conviction, the defendant faced a Range I sentence of fifteen to twenty-five years for especially aggravated robbery, a Class A felony. See T.C.A. §§ 39-13-403 (especially aggravated robbery); 40-35-112(a)(1) (Range I sentencing for Class A felony). He faced a Range I sentence of eight to twelve years for aggravated robbery, a Class B felony. See T.C.A. §§ 39-13-402 (aggravated robbery); 40-35-112(a)(2) (Range I sentencing for Class B felony). He faced a Range II sentence of six to ten years for conspiracy to commit aggravated robbery, a Class C felony. See T.C.A. §§ 39-12-103 (criminal conspiracy); 39-13-402 (aggravated robbery); 40-35-112(b)(3) (Range II sentencing for Class C felony).

The defendant conceded that he qualified for Range II sentencing on the conspiracy to commit aggravated robbery conviction based upon his prior criminal convictions. The record contains copies of the defendant's judgments of conviction from the state of Florida for two counts of burglary of an unoccupied conveyance, two counts of grand theft third degree, and one count of criminal mischief. In addition, the presentence report reflects that the defendant had several convictions, many of which appear to have occurred in Florida: two counts of felony escape, aggravated assault, two counts of assault and battery, possession of a weapon with intent to go armed, fraud, two counts of grand larceny, using a false identification, aggravated robbery, first degree murder, theft of property valued at $1,000 to $10,000, loitering, resisting arrest, theft of a vehicle. It is not clear from the presentence report whether some of the convictions listed in the presentence report may include some of the present offenses. The petitioner acknowledged in his trial testimony and at the sentencing hearing the two burglary of an unoccupied conveyance and two grand theft third degree convictions. He stated in his testimony at the sentencing hearing that he had an aggravated assault conviction stemming from an incident with his wife.

In imposing maximum sentences for each of the defendant's convictions other than the homicide, the trial court found that each sentence deserved enhancement based upon the defendant's history of criminal convictions or behavior, that the defendant was a leader in the commission of the offense, and that the defendant had a previous history of unwillingness to comply with the conditions of a sentence involving community release. See T.C.A. § 40-35-114(1), (2), (8) (1997). For the especially aggravated robbery conviction, the court also enhanced the defendant's sentence based upon its finding that the personal injuries inflicted or the amount of property taken was particularly great. See id. at (6). The court found that no mitigating factors had been shown. It weighed the enhancement factors heavily.

Because Apprendi and Blakely prohibit the use of judicially found enhancement factors other than the fact of a prior conviction, the trial court should not have enhanced the defendant's sentences based upon statutory factors (2), (6), and (8). Thus, the trial court's determinations are not entitled to the presumption of correctness, and our review is de novo.

However, we are unable to conduct a de novo review and resentence the defendant because we cannot determine whether some of the convictions reflected in the presentence report relate to the present offenses. The presentence report lists nine convictions from Coral Gables, Florida, the most serious of which is first degree murder, with both the date of occurrence and date of conviction for each being February 25, 2000. According to information elsewhere in the record, the defendant was declared a fugitive from Tennessee for the present crimes in March 2000. The trial court did not make specific findings relative to the defendant's prior criminal history other than its finding that in addition to the convictions required to show that the defendant was a Range II offender for one of the convictions, "there are additional criminal convictions or behavior[2] which even allows me to use factor number one in Count 1 [the Range II conviction]." We therefore must remand the case for a determination of the defendant's prior criminal convictions and the appropriate enhancement weight for the present convictions.

With respect to the question of consecutive sentencing, we note that this court has adhered to the view that Blakely and Cunningham do not require jury fact-finding in consecutive sentencing determinations. See, e.g., State v. Anthony Allen, No. W2006-01080-CCA-R3-CD, Shelby County (Tenn. Crim. App. June 25, 2007), app. granted (Tenn. Oct. 15, 2007); State v. Eric Lumpkins, No. W2005-02805-CCA-R3-CD, Shelby County (Tenn. Crim. App. June 7, 2007), app. granted (Tenn. Oct. 15, 2007). We have previously determined that the defendant was properly classified as a dangerous offender who had no hesitation to commit his crime despite the risk of life to the victim, that an effective sentence of life plus forty-seven years reasonably related to the severity of the offenses, and that the defendant needed to be incarcerated to protect society from his future criminal conduct. See T.C.A. § 40-35-115(b)(4); State v. Bryant Guartos, slip op. at 38-39.

Finally, we note that the United States Supreme Court's remand of this case pertained only to sentencing. When the defendant's appeal was first considered by this court, he raised issues related to the sufficiency of the evidence to support his convictions, allegedly newly discovered evidence entitling him to a new trial, various due process violations, the legality of his confession, and the admission of evidence, in addition to his allegation of sentencing error. With the exception of the sentencing claim, we reaffirm our previous holdings with respect to all other issues presented in the defendant's previous appeal to this court.

In consideration of the foregoing and the record as a whole, the judgments of the trial court for conspiracy to commit aggravated robbery, especially aggravated robbery, and aggravated robbery are reversed. The case is remanded for further sentencing proceedings consistent with this opinion.

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JOSEPH M. TIPTON, PRESIDING JUDGE

[2]The trial court also relied on the defendant's admitted cocaine use in applying enhancement factor (1). See T.C.A. § 40-35-114(1) (1997) (allowing for enhancement for prior criminal convictions or criminal behavior).